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**CHECKLIST FOR REVIEW  
OF  
MOUs & SIMILAR INSTRUMENTS**

**OFFICE OF GENERAL COUNSEL  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

*Revised November 2014*

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## Introduction

This Checklist is intended to assist attorneys in the Office of General Counsel (OGC) and Offices of Regional Counsel (ORC) in the review of agreements such as Memoranda of Understanding (MOU), Memoranda of Agreement (MOA), Statements and Letters of Intent, Joint Statements of Cooperation, Statements of Principles, and other similar agreements that are intended to be primarily aspirational in nature. For purposes of this Checklist, these agreements are referred to generically as “MOUs.” Depending on the applicable statutory authority (see page 8), EPA may enter into such agreements with a variety of entities, including other federal agencies; state, tribal, and local governments; private non-profit or for profit organizations; or foreign governments/entities.

OGC/ORC attorneys should use this MOU Checklist as general guidance when reviewing MOUs. The Checklist also provides model language for use in an MOU, as appropriate. When using this Checklist, keep in mind that it is intended to serve as general guidance only. There may be instances where the approach called for in this Checklist is not appropriate for a particular MOU.

This Checklist is not intended for use in the following situations:

- 1) *Partnership Program Agreements*: These agreements typically involve voluntary programs that feature a partnership program name(s) or logo(s). Consequently, these agreements contemplate a distinct category of agreement that involves intellectual property and necessitates review by GLO’s Intellectual Property Law Practice Group.
- 2) *Instruments Intended to Bind the Agency*: MOUs are, by their nature, non-binding. This Checklist is not intended to be used when there is a specific legal basis (in statute or regulation) to bind the Agency, such as MOAs under Section 128 of the Comprehensive Environmental Response, Compensation, and Liability Act.
- 3) *Situations involving co-sponsorship between EPA and other parties*: Agreements with other federal parties or non-federal parties to jointly sponsor discrete events such as conferences, meetings, exhibitions, and similar events are addressed instead by Ethics Advisory 96-15. For more information about collaboration with outside parties, consult EPA’s Model Co-sponsorship Agreement (<http://intranet.epa.gov/ogc/ethics/docs/template-for-agreement.doc>) and the 2012 online ethics training course, Collaborating With Outside Organizations (<http://intranet.epa.gov/ogc/ethics/training.htm>). Reviewers of such agreements may nonetheless find some of the information in this Checklist useful, and should consult CRFLO and Ethics for assistance with the review.
- 4) *Cooperative Research and Development Agreements (CRADAs)*: These agreements are between government and a private party to work together on research and development under the Federal Technology Transfer Act. Consult with GLO’s Intellectual Property Law Practice Group for more information about CRADAs.

## **The Review Procedure**

MOUs are reviewed by the Law Office or Region most closely associated with the program office developing the MOU. The MOU review procedure consists of multiple steps that vary depending on the nature of the MOU. For all MOUs, the lead attorney should carefully review the MOU to ensure that it is substantively correct and consistent with the Checklist. Only certain MOUs should be sent for to the MOU team for review. The MOU team consists of attorneys from the General Law Office, the Civil Rights and Finance Law Office, and the Ethics Team. See Appendix A.

The MOU should be reviewed as follows:

**Step 1:** The lead OGC/ORC attorney reviews and edits the MOU for substantive issues, including both legal and ethics issues, using this Checklist as a guide.

**Step 2:** The lead attorney should consult:

- with the appropriate OGC attorney listed in Appendix B if:
  - after considering the information in the Checklist, the lead attorney still has questions or concerns;
  - the Checklist does not address an issue; or
  - the MOU involves any of the following specific subjects:
    - Intellectual property,
    - Indian tribes,
    - International or trade,
    - Joint financing by federal agencies of a commission, board, or similar organization performing governmental functions,
    - Liability, including indemnification or hold-harmless provisions, and
    - Civil rights involving group classifications (e.g., race, national origin, sex, etc.) that trigger heightened judicial scrutiny under the Equal Protection Clause of the U.S. Constitution.
- with the entire MOU team only if the MOU will be signed by the Administrator or Deputy Administrator.
  - If the MOU needs to be reviewed by the MOU team, the lead attorney should provide the MOU team with a copy of the MOU containing the lead attorney's comments.

**Step 3:** If the MOU will be signed by the Administrator or Deputy Administrator, the lead attorney should send an email to the Deputy Administrator:

- informing the special assistant that an MOU is being drafted for signature by the Administrator or Deputy Administrator;

- identifying the name of the program lead; and
- including a copy of the draft MOU as an attachment.

This email is intended to provide notice to the office of the Administrator or the Deputy Administrator of the impending MOU. If the special assistant has comments, he/she should direct them to the program lead. See Appendix C for the name of the Special Assistant.

**Step 4:** Once the lead attorney—and the MOU team if necessary—has completed reviewing the MOU, the lead attorney should consolidate all comments and provide them to the client. If the client or the other party has questions about comments that were provided by a member of the MOU team, consult with that team member to determine the best way to effectively communicate with the client and/or other party.

A program office may ask for OGC/ORC concurrence on an MOU. The reviewing law office should determine what the appropriate level and form of concurrence should be.

## **Summary**

This Checklist is intended to serve as guidance for the review of MOUs and similar aspirational agreements. It is not intended to be all inclusive; rather, it is intended to address issues that come up most frequently in MOUs. If you have a specific question regarding the appropriateness of an MOU or its content, you should contact the lead attorney reviewing the MOU. If you have a specific question regarding the appropriateness of an MOU or its content, you should contact the appropriate attorney listed in Appendix B.

## **QUESTIONS TO ASK WHEN PREPARING OR REVIEWING AN MOU**

### **General Issues**

- 1. Is an MOU the appropriate instrument to use to accomplish the Agency's objectives?**

When reviewing a draft MOU or communicating with a program office regarding a planned MOU, it is important to consider whether an MOU is the proper vehicle for the intended activity.

An MOU is the appropriate instrument if the desired outcome is an agreement memorializing an agreement with another federal agency or an outside party that is aspirational in nature.

Some examples of situations in which an MOU is **not** appropriate are:

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## **Ex. 5 Attorney Client (AC)**

~~appropriate venue is an interagency agreement rather than an MOU.~~

OGC Contact: GLO, Intellectual Property Law Practice Group; CRFLO (Interagency Agreements), Claims, Property, and Appropriations Law Practice Group

### **2. How should the MOU be titled?**

It is important to remember that the title of an MOU is not, in and of itself, determinative of its legal effect. Although the title may provide evidence of the signatories' intent, it is the substantive terms of the MOU that generally are determinative of the MOU's legal effect. Nonetheless, you should consider the title carefully and ensure that it reflects the parties' intent to create a document that is not legally binding.

### **3. Who has authority to sign MOUs?**

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OGC Contact: CRFLO, Claims, Property, and Appropriations Law Practice Group

### **4. Does the MOU involve Indian tribes?**

MOUs involving Indian Tribes may raise special issues due to the unique legal status of federally-recognized Indian Tribes and the federal government's trust relationship with them. After reviewing and editing the document, the lead attorney should send MOUs that involve Indian Tribes to the CCILO Indian Law contact for review.

OGC Contact: CCILO, Communities and Ecosystems Practice Group

### **International MOUs**

**5. Does the MOU involve a foreign government or entity or involve international efforts to promote environmental protection?**

MOUs are sometimes used to document plans for collaborating with foreign governments, foreign entities, international organizations, and other organizations regarding international cooperative environmental efforts. International MOUs raise a number of legal issues, including issues relating legal authority, expenditure of funds, endorsement, compliance with State Department regulations and others.

**5.a. What is the legal authority to collaborate in an international context?**

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Ex. 5 Attorney Client (AC) As with any MOU, before EPA can enter into an MOU that memorializes cooperative international efforts, EPA needs to ensure that it possesses the legal authority to carry out the tasks it intends to undertake.

**5.b. Does the international MOU contain any binding language in the Title or substantive provisions?**

If EPA and the foreign government(s) intend to be bound by an instrument, an MOU generally is not the appropriate instrument. Additionally, MOUs are not an appropriate instrument to transfer funds. Instead, OGC recommends the use of a cooperative agreement to memorialize such commitments.

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**5.c. Has U.S. Department of State been contacted?**

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OGC Contact: CCILO, International Environmental Law Practice Group

**General Content: Context, Activities, and Authorities**

**6. Is the purpose of the MOU clearly explained?**

It is important for all parties to have a clear understanding of what is intended to be accomplished through the MOU. Therefore, the purpose of the MOU should be set forth clearly and concisely, either in a “Purpose” section or in some other identifiable way.

**7. Does the MOU provide the necessary context/background?**

As a general matter, the MOU should at least briefly explain its context (*e.g.*, events leading up to the MOU and/or the basis for each signatory’s interest in the activities called for in the MOU). This information should be included in a “Background” section or another appropriate provision.

**8. Does the MOU describe EPA’s authority to undertake the activities described in the MOU?**

The MOU should state the statutory provision(s) or other relevant provisions (*e.g.*, international treaty) that provide EPA with the authority to undertake the activities described in the MOU. Before engaging in any collaborative effort, including MOUs, EPA must have appropriate authority to commit EPA resources to the collaboration. EPA resources include official duty time of EPA employees, not just contract or grant money.

Listed below are examples of statutes that authorize EPA to carry out voluntary programs to promote environmental protection. These statutes are provided as examples only. There may be other statutes, regulations, treaties, etc., that provide EPA with the relevant authority.

If you have questions about EPA’s authority to undertake a specific activity, contact the CRFLO contact for finance issues.

**A. General Authorities**

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## **Ex. 5 Attorney Client (AC)**

### **B. International Authorities**

## **Ex. 5 Attorney Client (AC)**

### **C. Media-Specific Authorities**

## **Ex. 5 Attorney Client (AC)**

## **Ex. 5 Attorney Client (AC)**

### **D. Program-Specific Authorities**

## **Ex. 5 Attorney Client (AC)**

## Ex. 5 Attorney Client (AC)

OGC Contact: CRFLO, Claims, Property, and Appropriations Law Practice Group

9. **Does the MOU set forth in a clear and concise manner the actions each party intends to undertake pursuant to the MOU?**

An MOU should clearly and concisely state what the parties intend to do, individually or together, under the MOU. The specific level of detail in this regard should be determined on a case-by-case basis.

10. **Does the MOU contain mandatory language or other provisions that create, or appear to create, binding legal obligations?**

MOUs are generally intended to be aspirational in nature. Therefore, MOUs that EPA enters into generally should avoid the use of mandatory language (must, shall, will, etc.).

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## Ex. 5 Attorney Client (AC)

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<sup>1</sup> See, e.g., *Total Med. Mgmt. v. U.S.*, 104 F.3d 1314 (Fed. Cir. 1997) (holding MOU between United States and private health care company could bind the U.S. in contract). In this case, the U.S. Court of Appeals for the Federal Circuit found the MOU at issue to have all of the basic elements of a contract, and, therefore, be indicative of an intent to be legally bound, notwithstanding the parties' statements to the contrary.

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This does not mean that “mandatory” language may never be used in an MOU. There are, in fact, specific instances where the use of mandatory language may be warranted. For example, in some cases it is necessary for the MOU to recite an existing legal duty. To ensure that it is clear that the duty is imposed by statute, regulation, or U.S. treaty rather than the MOU, a citation to the statutory, regulatory, or treaty section that imposes the duty should be included after the statement of the duty.

Another example of a provision for which mandatory language is necessary is a provision in which the non-federal party is agreeing to grant EPA a copyright license

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This MOU is a voluntary agreement that expresses the good-faith intentions of the Parties, is not intended to be legally binding, does not create any contractual obligations, and is not enforceable by any party.

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<sup>2</sup> See, e.g., *West Virginia Mining & Reclamation Ass’n v. Snyder*, 1991 WL 331482 (N.D. W. Va. 1991). In this case, the District Court held that an MOU between the Department of Interior’s Office of Surface Mining Reclamation and Enforcement and the West Virginia Division of Energy was a substantive rule because it was “designed to implement, interpret or prescribe law or policy.” See also Comptroller General letter to Senator Bingaman, Subject: Recognition of R.S. 2477 Rights-of-Way under the Department of Interior’s FLPMA Disclaimer Rules and its Memorandum of Understanding with the State of Utah, 2004 WL 235329 at \*3 (Comp. Gen. Feb. 6, 2004). In this letter, the Comptroller General opines that the MOU with Utah was a substantive rule because it “both satisfies the APA’s definition of ‘rule’ . . . and meets the key test by which courts have defined substantive rules . . . it has a binding effect on the agency and other parties and represents a change in law and policy.”

<sup>3</sup> See, e.g., *Bragg v. Roberston*, 72 F.Supp 2d 642, 654-55 (S.D. W.Va. 1999). In this case, the District Court held that an MOU entered into by EPA, OSM, ACOE and W. Va. DEP was an interpretive rule. Ultimately, the court rejected the MOU on the basis that it was inconsistent with, and an erroneous interpretation of, the CWA.

If the MOU addresses copyright or other intellectual property issues that require the use of mandatory language and GLO has determined that an MOU is the correct instrument, the copyright or intellectual property provision should be set out in a separate section of the MOU and the recommended language below should be used:

With the exception of section [insert section number], this MOU is a voluntary agreement that expresses the good-faith intentions of the Parties, is not intended to be legally binding, does not create any contractual obligations, and is not enforceable by any party.

OGC Contact: GLO, Intellectual Property Law Practice Group

**11. Does the MOU contain the appropriate “no private right of action” language?**

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**12. Does the MOU provide for its commencement, duration, modification, and termination?**

All MOUs should provide for their commencement, duration, modification, and termination. It is recommended that an MOU be reviewed by the parties at least every three years. **Ex. 5 Attorney Client (AC)**

## **Ex. 5 Attorney Client (AC)**

In addition, it is useful to have specific notice provisions, detailing how notice should be given, to whom, and when notice becomes effective.

In some instances, an MOU may contain a provision that the parties agree should continue after the agreement terminates, such as licenses of intellectual property and treatment of confidential information. In that case, the reviewer should consider inserting a survival clause into the MOU. **Ex. 5 Attorney Client (AC)**

## **Ex. 5 Attorney Client (AC)**

OGC Contact: GLO, Intellectual Property Law Practice Group

### **Financial Provisions**

13. **Does the MOU purport or appear to obligate funds? Does the MOU provide for compliance with appropriations law and Agency policies relating to competition for grants and contracts?**

The Agency must comply with the Antideficiency Act, 31 U.S.C. 1341 and 1342, the Recording Statute, 31 U.S.C. 1501, and Subpart 1.6 of the Federal Acquisition Regulation governing unauthorized commitments of funds.

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## **Ex. 5 Attorney Client (AC)**

**Ex. 5 Attorney Client (AC)**

OGC Contact: CRFLO, Claims, Property, and Appropriations Law Practice Group

- 14. Does the MOU create the appearance that federal agencies are jointly financing a commission, board, or similar organization to carry out governmental responsibilities?**

Interagency financing of commissions, boards, or similar organizations that perform governmental functions, is prohibited by 31 U.S.C. 1346(a)

**Ex. 5 Attorney Client (AC)**

## **Ex. 5 Attorney Client (AC)**

OGC Contact: CRFLO, Claims, Property, and Appropriations Law Practice Group

- 15. Does the MOU include an indemnification provision?**

An indemnification provision is a provision by which a party agrees to satisfy monetary claims against another party. An indemnification agreement may also be characterized as a “hold harmless” provision in which one party agrees to insure another against claims or losses. EPA cannot enter into indemnification or hold harmless agreements because these provisions potentially expose the Agency to unlimited liabilities in advance of, or in excess of, available appropriations in violation of the Antideficiency Act, 31 U.S.C. 1341.

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## **Ex. 5 Attorney Client (AC)**

OGC Contact: CRFLO, Claims, Property, and Appropriations Law Practice Group

### **Intellectual Property/Trademark Issues**

16. **Is it possible that the activities described in the MOU may create intellectual property?**

Intellectual property issues may also arise in MOUs, especially those involving collaborative research and development, the presentation of trainings or seminars, or the creation of informational materials, including software or models. MOUs that involve the use or creation of intellectual property can range from the creation of a copyrightable journal article, to the creation of a named (trademarked) initiative, to the development of a patented process.

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## **Ex. 5 Attorney Client (AC)**

OGC Contact: GLO, Intellectual Property Law Practice Group

**17. Does the MOU address use of the EPA seal or identifier (logo)?**

The Agency's official seal and identifier (logo) may only be used for official purposes.

## **Ex. 5 Attorney Client (AC)**

OGC Contact: Ethics Team (endorsement concerns); GLO (concerns about use of the Agency's seal), Intellectual Property Law Practice Group

### **Privileged Information**

**18. Will the MOU involve sharing information that a non-federal party may consider to be proprietary or privileged?**

Privileged information may include, but not limited to, the following: confidential business information, deliberative process, attorney-client, attorney-work product, personally identifying information, or enforcement confidential. If the MOU involves sharing privilege information (deliberative process, attorney-client, attorney-work product, personally identifying information, or enforcement confidential), then a separate tool, such as a non-disclosure agreement, may be necessary to protect this information. If your MOU requires sharing this information, then please contact the General Law Office.

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OGC Contact: GLO, Information Law Practice Group

### Outside Organizations

19. Does the MOU indicate that EPA is establishing, or actively participating in establishing, a corporation?

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OGC Contact: CRFLO, Claims, Property, and Appropriations Law Practice Group

20. Does the MOU create the appearance that EPA is establishing or participating in a *de facto* organization?

Some MOUs establish organizations that, while not officially incorporated, function or appear to function as independent legal entities. These organizations are often characterized as “associations” or “partnerships.”

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## Ex. 5 Attorney Client (AC)

## **Ex. 5 Attorney Client (AC)**

OGC Contact: CRFLO, Claims, Property, and Appropriations Law Practice Group

21. **Does the MOU contemplate that an EPA official will serve on the Board of Directors or a similar body that governs a non-federal organization?**

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OGC Contact: Ethics Team

### **Fundraising**

22. **Does the MOU imply that EPA supports any fundraising efforts?**

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**Ex. 5 Attorney Client (AC)** Under no circumstances can any MOU imply that EPA or its employees support or participate in any fundraising

activities for or with the non-federal entity. See sample language in “Endorsements,” below.

OGC Contact: Ethics Team

### **Endorsements**

23. **Does the MOU imply that EPA endorses the purchase or sale of commercial services or products?**

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OGC Contact: Ethics Team

### **Civil Rights Issues**

24. **Does the MOU contemplate activities that are intended to benefit certain individuals *because of* their group classification (e.g., race, national origin, etc.) or certain entities *because of* the group classification of their stakeholders (e.g., students, constituents, members)?**

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OGC Contact: CRFLO, Civil Rights Law Practice Group

### **Other Potential Legal Issues**

25. Does the MOU involve the establishment of a group that will develop advice for EPA or another part of the federal government?

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OGC Contact: CCILO, Regulatory Issues Practice Group

26. Do the activities under the MOU involve surveys, reporting, recordkeeping, or other information collection activities?

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OGC Contact: CCILO, Regulatory Issues Practice Group

## **APPENDIX A: MOU TEAM**

The MOU Team consists of:

Lucille Liem – CRFLO

Justina Fugh – Ethics

Kathleen Coleman – GLO

## **APPENDIX B: OGC ATTORNEY CONTACT INFORMATION**

### **Finance Law Issues**

- |                       |              |
|-----------------------|--------------|
| ▪ Lucille Liem, CRFLO | 202-564-5699 |
| ▪ Ann Sisson, CRFLO   | 202-564-5469 |
| ▪ Rich Feldman, CRFLO | 202-564-5434 |

### **Ethics Issues**

- |                        |              |
|------------------------|--------------|
| ▪ Justina Fugh, Ethics | 202-564-1786 |
| ▪ Jennie Keith, Ethics | 202-564-3412 |

### **Civil Rights Issues**

- |                           |              |
|---------------------------|--------------|
| ▪ Tricia Jefferson, CRFLO | 202-564-6628 |
|---------------------------|--------------|

### **Intellectual Property Issues**

- |                         |              |
|-------------------------|--------------|
| ▪ Kathleen Coleman, GLO | 856-769-5254 |
|-------------------------|--------------|

### **Issues Involving Indian Tribes**

- |                     |              |
|---------------------|--------------|
| ▪ Joe Edgell, CCILO | 202-564-5514 |
|---------------------|--------------|

### **International Issues**

- |                       |              |
|-----------------------|--------------|
| ▪ Tim Epp, CCILO      | 202-564-2830 |
| ▪ Lauren Maher, CCILO | 202-564-9888 |

### **Mandatory Language Issues**

- |                         |              |
|-------------------------|--------------|
| ▪ Ed Kulschinsky, CCILO | 202-564-4133 |
|-------------------------|--------------|

**Privileged Information Issues**

- Quoc Nguyen, GLO 202-564-6343

**Federal Advisory Committee Act**

- Marilyn Kuray, CCILO 202-564-3449

**Paperwork Reduction Act**

- Ed Kulschinsky, CCILO 202-564-4133

**Delegations Issues**

- Joanne Hogan, GLO 202-564-5463

**APPENDIX C: SPECIAL ASSISTANT TO THE DEPUTY  
ADMINISTRATOR**

- Amir Ingram 202-564-0150